

**United States Bankruptcy Court
Eastern District Of Washington**

In Re:

TOM E. & TIFFANI HIBBS

Main Case Number: 05-11474

Debtor(s).

DECISION

In their confirmed chapter 13 plan, debtors Tom and Tiffani Hibbs surrendered a Polaris four-wheeler to creditor HAPO Credit Union in satisfaction of HAPO's secured debt. After accepting the surrender of the four-wheeler, HAPO sold it and filed an amended deficiency claim. The Hibbs object to the deficiency claim and seek to modify their chapter 13 plan to specify that the four-wheeler was surrendered in full satisfaction of HAPO's total claim. Because the four-wheeler is a "thing of value" that secures a debt incurred within one year of the petition date, the plan treatment for the four-wheeler must satisfy the unnumbered and unlettered "hanging paragraph" that follows 11 U.S.C. § 1325(a)(9).¹ Ultimately the resolution of this case is governed by two Bankruptcy Appellate Panel cases, Trejos v. VW Credit, Inc., (In re Trejos), __ B.R. __, 2007 WL 2391184 (9th Cir. BAP, July 2007) and Wells Fargo Financial Acceptance v. Natalie Dionne Rodriguez (In re Rodriguez), __ B.R. __, 2007 WL 2701295 (9th Cir. BAP, August 28, 2007). Together, these cases mandate that the Hibbs must pay HAPO's total allowed claim, regardless of the value of the four-wheeler and regardless of whether the four-wheeler is retained or surrendered.

STATEMENT OF FACTS

On July 2, 2005, the Hibbs borrowed \$10,323.47 from HAPO to finance the purchase of a 2005 Polaris four-wheeler. Approximately six months later, they filed a petition for relief under Chapter 13 of the bankruptcy code. In their bankruptcy schedules, the Hibbs listed the HAPO claim as a secured

¹ The "hanging paragraph" that follows § 1325(a)(9) is cited herein as § 1325(a)(*).

1 debt, in the amount of \$10,000.00, secured by collateral valued at \$10,001.00. Along with their
2 bankruptcy schedules, the Hibbs filed a chapter 13 plan in which they proposed to retain the recently
3 purchased four-wheeler and pay the HAPO claim in full, with interest, in monthly plan payments.
4 Twice thereafter, the Hibbs modified their proposed plan, and in each modification, they proposed to
5 retain the four-wheeler and pay the HAPO claim as a fully secured claim.

6 After the Hibbs submitted their plan, they filed a claim for HAPO. In that claim, the Hibbs listed
7 both the amount of the HAPO debt and the value of the four-wheeler as \$10,506.00. Thereafter, HAPO
8 filed its own claim. In subsection one of the proof of claim form, HAPO checked the box that contains
9 the assertion that some or all of the claim is secured and listed the amount as \$10,506.22. In subsection
10 four, HAPO identified the collateral for its claim as the Polaris four-wheeler, and stated its value as
11 \$10,001.00, a figure likely taken from the debtors' bankruptcy schedules. In the same subsection,
12 HAPO listed the total amount of its secured claim as \$10,506.22, the same amount as its total claim.
13 Elsewhere on the proof of claim form, in subsection six, HAPO summarized its claim somewhat
14 differently. The secured claim is stated as \$10,506.22 and the unsecured claim as \$505.22, the
15 difference between the amount of the claim and the value of the collateral.

16 Before confirmation, the Hibbs modified their proposed plan for the third time. In the third
17 modification, the Hibbs proposed to surrender the 2005 Polaris four-wheeler by providing:

18 The secured claim of Prime Acceptance, HAPO Credit Union and Wells
19 Fargo Financial Acceptance shall be treated in accordance with the
20 surrender provisions of paragraph III.A.4.b.; and the debtor shall
21 surrender the vacuum cleaner, the four-wheeler and the 2001 Dodge
22 Ram.

23 Paragraph III. A.4.b refers to a provision in the Hibbs' form chapter 13 plan that treats secured claims
24 by surrendering the collateral. The relevant provision provides:

25 Debtor surrenders the collateral securing the claims of the following
26 creditors in satisfaction of the secured portion of such creditor's claim.
27 To the extent the collateral does not satisfy such creditor's claim, the
28 creditor shall be treated as the holder of an unsecured claim and paid as

1 provided in section III.A6 (Priority Claims), if entitled to priority under
2 11 U.S.C. § 507, or if not, as provided in Section III.A8 (Unsecured
3 Claims). The entry of the order confirming the plan shall terminate the
4 automatic stay of 11 U.S.C. § 362(a) as to the collateral surrendered,
5 thereby allowing recovery and disposition of such property, according to
6 applicable nonbankruptcy law.

7 In section III. A.8 the Hibbs provide for the full payment of allowed unsecured claims.

8 The Hibbs mailed the proposed modification of their chapter 13 plan to all of their creditors,
9 affording the creditors 23 days notice to object to the modification of the plan. Before the notice period
10 expired, the Hibbs' chapter 13 plan came before the court for confirmation. At that time, the Hibbs
11 asked the court to confirm their chapter 13 plan as modified, even though the 23 days for creditors to
12 object had not expired. The plan was confirmed, without objection from the chapter 13 trustee. In due
13 course, the four-wheeler was surrendered to HAPO as provided by the confirmed chapter 13 plan.
14 HAPO then sold the four-wheeler as provided by the parties security agreement and applicable
15 nonbankruptcy law.

16 After the sale, HAPO filed an amended claim, asserting an unsecured claim in the amount of
17 \$5,871.62. The Hibbs objected to this amended proof of claim, noting the original proof of claim states
18 a total debt of \$10,506.22, a collateral value of \$10,001.00, and an unsecured debt of only \$505.22.
19 Also, the Hibbs' objection disputed whether HAPO was entitled to any deficiency because 11 U.S.C.
20 § 506 does not apply "if collateral for that debt consists of any other thing of value, if the debt was
21 incurred during the one year period proceeding that filing." § 1325(a)(*). The confirmed plan
22 surrendered the four-wheeler in satisfaction of HAPO's secured claim. In other words, the Hibbs
23 maintain that if HAPO had a fully secured allowed claim for \$10,506.22, regardless of the actual value
24 of the collateral, the fully secured claim by definition must be satisfied upon the surrender of the
25 collateral under § 1325(a)(5)(C).

26 About one year after confirming their plan, the Hibbs filed a post confirmation modification of
27 the plan. In that modification, the Hibbs proposed to surrender the Polaris four-wheeler to HAPO in full
28 satisfaction of the debt, emphasizing "no alleged deficiency shall be paid by the trustee." The proposed

1 modification elicited an objection from HAPO. HAPO contends § 1325(a)(5)(C) and (*) do not prevent
2 it from filing an unsecured deficiency claim.

3 DISCUSSION

4 There are two contested matters before the court- the objection to HAPO's deficiency claim
5 and the objection to the Hibbs' proposed modification of their chapter 13 plan. Because the four-
6 wheeler is "a thing of value" that secures a debt incurred within one year of filing the chapter 13, and
7 consequently subject to § 1325 (a)(*), the Hibbs can not cram down the HAPO debt. If the Hibbs
8 wanted to retain the collateral, they would have to pay HAPO's total claim. In re Trejos, __ B.R. __,
9 2007 WL 2391184 (9th Cir. BAP, July 30, 2007). Here, the question is what happens if the Hibbs'
10 confirmed chapter 13 plan provides for the surrender of the four-wheeler in satisfaction of HAPO's
11 secured debt as authorized by § 1325 (a)(5)(C).

12 Before the court addresses that issue, the court must examine the confirmed chapter 13 plan.
13 Shortly before the regularly scheduled confirmation hearing date, the Hibbs modified their plan by
14 providing for the surrender of the four-wheeler in satisfaction of HAPO's secured debt. HAPO had
15 23 days to object to this treatment, a period of time that expired after the confirmation hearing date.
16 Undoubtly thinking that the surrender of the collateral was a treatment to which HAPO could not
17 object and probably not understanding that the four-wheeler was § 1325(a)(*) collateral, the Hibbs
18 asked the court to confirm their plan as modified. Unfortunately, the court complied with their
19 request. Thereafter, HAPO neither objected to nor appealed the confirmation order. In fact, HAPO
20 acquiesced to the plan treatment of its claim by accepting the surrender of the collateral and selling
21 it.

22 In its initial claim, HAPO states that the total amount of its claim is \$10,506.22. When the
23 Hibbs asked the court to confirm their plan, they had not objected to this claim. As a consequence, §
24 502(a) provides HAPO's claim is deemed allowed as filed. Also, § 1327 makes the Hibbs' plan
25 treatment for the HAPO allowed claim binding both upon HAPO and the Hibbs. This may be true,
26 even if the Hibbs' plan treatment for the HAPO claim does not otherwise comport with § 1325
27 confirmation requirements, including § 1325(a)(*). Washington Mutual Bank v. Enewally (In re
28 Enewally), 368 F.3d 1165, 1172 (9th Cir. 2004).

1 As confirmed, the Hibbs' chapter 13 plan provides that the Hibbs surrender the four-wheeler
2 securing HAPO's claim **"in satisfaction of the secured portion of such creditor's claim."** It
3 further provides **"to the extent the collateral does not satisfy such creditor's claim,"** the creditor
4 shall be treated as the holder of an unsecured claim. Additionally, the plan treatment provides that
5 the § 362(a) automatic stay is terminated as to the collateral, **"thereby allowing recovery and**
6 **disposition of such property according to applicable nonbankruptcy law."** This plan treatment
7 is designed for property subject to bifurcation by means of § 506. In other words, the plan treatment
8 anticipates the secured portion of the creditor's claim will be satisfied by the surrendered collateral
9 and the remaining unsecured portion will be paid as an unsecured claim.

10 For property subject to § 1325(a)(*), the plan treatment is problematical. HAPO's status as a
11 secured claim is not determined by operation of § 506, which does not apply. Rather, HAPO's
12 secured status is dictated by state law. Trejos, __B.R.__, 2007 WL 2391184 (9th Cir. BAP, July 30,
13 2007). Additionally, for § 1325(a)(*) collateral, **"the value of the collateral is irrelevant in**
14 **determining the allowed amount of the secured claim[.]"** Id., quoting In re Flemming, 339 B.R. 716,
15 722 (Bankr. E.D.Mo., 2006). Consequently language in the plan treatment that speaks in terms of
16 **"the secured portion of such creditor's claim"** is troubling. On the other hand, a plan treatment that
17 surrenders the collateral, allows a disposition according to nonbankruptcy law, and pays any
18 resulting deficiency as an unsecured claim is a plan treatment that the BAP holds satisfies the
19 confirmation standard for surrendered § 1325(a)(*) collateral. In re Rodriguez, __B.R.__ 2007 WL
20 2701295 (9th Cir. BAP, August 28, 2007).

21 As a preliminary matter, the court must decide what does the Hibbs' confirmed plan actually
22 provide for the HAPO claim. Does it provide that the HAPO claim is satisfied and fully paid by the
23 surrender of the collateral because the total claim is the secured portion of the claim? If so, is
24 HAPO bound by this plan treatment, pursuant to § 1327, because HAPO failed to timely object to
25 the plan or appeal the confirmation order? If so, is HAPO precluded from modifying its claim by the
26 *res judicata* effect of the confirmation order? Or, does the plan provide the surrender of the
27 collateral satisfies the claim to the extent of the proceeds from the nonbankruptcy disposition of the
28 property, with any deficiency being paid as an unsecured claim?

1 There are good reasons why the Hibbs' confirmation order incorporating their plan treatment
2 for the HAPO claim cannot be given *res judicata* effect preventing the amendment of the HAPO
3 claim. First, the plan fails to state its intended effect upon the HAPO claim with sufficient clarity.
4 County of Ventura v. Robert and Cheryl Brawders (In re Brawders), __ F.3d __ 2007 WL 2596468
5 (C.A. 9). This would be a very different case if the Hibbs' original plan contained the language now
6 urged upon the court for the post confirmation amendment of the Hibbs' plan: **"...the 2005 Polaris
7 four-wheeler is surrendered to HAPO Community Credit Union in full satisfaction of the debt,
8 and no alleged deficiency shall be paid by the trustee."** In that case, both the court and the
9 creditor would have known what was being determined and litigated by the confirmation order. In
10 its current form, any ambiguity in the plan must be interpreted against the debtor. *Id.* Second, the
11 application of *res judicata* is limited by considerations of due process that require adequate notice
12 and compliance with bankruptcy procedures. Enewally, 368 F.3d at 1173; Educ. Credit Mgmt. Corp
13 v. Repp (In re Repp), 307 B.R. 149-54 (9th Cir. BAP 2004). In this case, the bankruptcy procedures
14 were not followed and the creditor was not given adequate notice because the Hibbs' chapter 13 plan
15 was confirmed as modified before the expiration of the time to object to the modification of their
16 plan. In short, *res judicata* does not prevent HAPO from amending its claim.

17 There are other reasons that support an order authorizing the amendment of HAPO's claim.
18 Amendments to timely filed claims are liberally allowed. Hi-Tech Communications Corp. v.
19 Poughkeepsie Business Park, LLC (In re Wheatfield Business Park LLC), 308 B.R. 463, 468 (9th Cir.
20 BAP (Cal 2004)). The crucial inquiry is whether the opposing party would be unduly prejudiced by
21 the amendment. Roberts Farms Inc. v. Bultman (In re Roberts Farms Inc.), 980 F.2d 1248, 1251 (9th
22 Cir. 1990). Accordingly "...amendment of a proof of claim is freely permitted so long as the claim
23 initially provided adequate notice of the existence, nature, and amount of the claim as well as the
24 creditor's intent to hold the estate liable." Unioil v. Elledge (In re Unioil), 962 F.2d 988, 992 (10th
25 Cir. 1992). However, "[t]he court should not allow truly new claims to proceed under the guise of
26 amendment." *Id.* at 992.

27 To paraphrase Trejos, Congress has decided, as a policy matter, under the BAPCPA
28 revisions to the bankruptcy code, that the Hibbs should repay in a chapter 13 the amount they

1 actually agreed to pay for the four-wheeler, instead of its true value. Trejos, __B.R.__, 2007 WL
2 2391184 (9th Cir. BAP, July 30, 2007). Rodriguez holds only a plan that provides for the payment of
3 HAPO's deficiency claim after surrender of the four-wheeler meets the § 1325 criteria for §
4 1325(a)(*) collateral. Rodriguez, __B.R.__, 2007 WL 2701295 (9th Cir. BAP, August 28, 2007).
5 Therefore it cannot be stated that the amendment of the claim is either unfair or prejudicial to the
6 Hibbs. For the same reason, HAPO's amended claim is not a different or new claim. As analyzed
7 by this court, the Hibbs' plan is unclear and may be interpreted as contemplating that HAPO would
8 be allowed an unsecured deficiency claim, after disposing of its collateral as provided by the parties
9 security agreement and applicable nonbankruptcy law. In such a case, the plan is interpreted in favor
10 of HAPO and against the drafter of the plan. For all of these reasons, the court grants HAPO
11 permission to file an amended claim.

12 The final issue to be addressed by the court is whether the Hibbs should be permitted to
13 modify their plan to provide that the four-wheeler is surrendered in full satisfaction of HAPO's total
14 claim, leaving no deficiency. Even though the proposed modification is untimely, the court will
15 address the merits of the modification. In order to grant the modification, the court would have to
16 refuse to follow the recent holding in Rodriguez, where the BAP held that creditors secured by
17 surrendered 910 collateral may submit deficiency claims. Rodriguez, __B.R.__, 2007 WL 2701295
18 (9th Cir. BAP, August 28, 2007). The court recognizes that there is some controversy regarding
19 whether BAP decisions are binding upon other bankruptcy courts in the circuit. In re Windmill
20 Farms, Inc., 70 B.R. 618, 621-22, 16 (9th Cir. BAP 1987); In re Proudfoot, 144 B.R. 876, 878-79 (9th
21 Cir. BAP 1992); Kuney, Where We Are and Where We Think We Are: An Empirical Examination
22 of Bankruptcy Precedent, 28 Cal. Bankr. J. 71, 81-83 (2005). Regardless this court intends to follow
23 and apply BAP precedent because the existence of appellate authority ultimately benefits litigants,
24 their attorneys and trial courts. Downing Carroll, Why Practicality Should Trump Technicality: A
25 Brief Argument for the Precedential Value of Bankruptcy Appellate Panel Decisions, 33 Creighton
26 L. Rev. 565 (2000). Based upon the Rodriguez precedent, the court denies the Hibbs' motion for
27 modification of their chapter 13 plan.
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CONCLUSION

In conclusion, the court authorizes HAPO to file an amended claim asserting a deficiency claim. The court further holds that the Hibbs' motion for modification of their chapter 13 plan is denied.



Frank L. Kurtz
Frank L. Kurtz
Bankruptcy Judge

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